94 604 JUL - 5 1994

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JAMIE QUINTERO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Arthur L. Wallace, III
2401 E. Atlantic Blvd.
Pompano Beach, FL 33062
(305) 943-2020

Cloud H. Miller, III
Law Office of Miller & Shein
710 Lake View Avenue, N.E.
Atlanta, GA 30308

CERTIFICATE OF SERVICE

I hereby certify that on this July 3, 1994, I caused the foregoing Writ of Certiorari, to be served upon counsel and Appellant, by causing to be mailed two copies, postage prepaid, to:

Victor Arnow
P.O. Box 3436
Phoenix, AZ 85030

Bruce Feder
P.O. Box 25129
Phoenix, AZ 85002

Dennis Jones
335 E. Palm Lane
Phoenix AZ 85004

Maureen R. Kallins
755 Sansome St., Ste. 350
San Francisco, CA 94111

AUSA Thomas L. Fink
Acapulco Building Suite 8310
110 South Church Avenue
Tucson, AZ 85701

Jamie Quinero
USP Lewisburg
Lewisburg, PA

Cloud H. Miller, III

QUESTIONS PRESENTED

I. Whether a "Willing to Act" Reasonable Doubt Instruction, objected to in conjunction with closing arguments which interpreted that the "beyond a reasonable doubt" standard was somewhere between fifty (50) percent and one hundred (100) percent certain, violated Petitioners rights to Due Process of Law, by permitting the jury to convict on a lesser showing, than Due Process requires, as this Court has mandated In **Re Winship**, 397 U.S. 358 (1970), **Cage v. Louisiana**, 498 U.S. 39 (1990), **Sullivan v. Louisiana**, 508 U.S. ___, 113 S.Ct. 2079, 124 L.E.D. 2d 187 (1993) and **Victor v. Nebraska**, 114 S.Ct. 1239 (1994).

PARTIES BELOW

Petitioner, JAMIE QUINTERO, *Defendant-Appellant.*

Respondent, UNITED STATES OF AMERICA, *Plaintiff-Appellee.*

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . i

PARTIES BELOW. ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED. 3

STATEMENT OF THE CASE. 4

ARGUMENT 10

CONCLUSION 19

APPENDIX:

Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit . . 20

Petition for Rehearing 11

Order Denying Rehearing and Rehearing En Banc. 12

Judgment of the United States District Court 13

TABLE OF AUTHORITIES

CASES

Addington v. Texas
441 U.S. 418 (1979) 15

Cage v. Louisiana
498 U.S. 39 (1990). i,10,12
13,15

Coffin v. United States
156 U.S. 432 (1985) 16

Holland v. United States
348 U.S. 121 (1954) 7,11

Patterson v. New York
432 U.S. 197 (1977) 15

Stantosky v. Kramer
455 U.S. 745 (1982) 17

Sullivan v. Louisiana
113 S.Ct. 2079 (1993) i,11,13,14

Taylor v. Kentucky
436 U.S. 478 (1978) 17

Victor v. Nebraska
114 S.Ct. 1239 (1994) i,11,17

In re Winship
397 U.S. 358 (1970) i,15,16

United States v. Clabaugh
589 F.2d 1019 (9th Cir.1979). 13

United States v. Jaramillo-Suarez
950 F.2d 1378 (9th Cir. 1991). 12

United States v. Meza-Sorira
935 F.2d 166 (9th Cir.1991). . 13

United States v. Moreno-Pulido
695 F.2d 1141 (9th Cir.1983) . . . 17

United States v. Robinson
546 F.2d 309 (1976)
cert. denied
430 U.S. 918 (1977) 11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JAMIE QUINTERO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There are no other reports of opinions delivered in this case other than the Ninth Circuit Opinion which can be found in the Appendix at A1.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was ordered January 25, 1994. (Appendix A.) Timely petitions for rehearing, and rehearing en banc were filed by Appellants Gomez, Morales, and Grisales, in which Petitioner joined. The petitions were denied on April 4, 1994. (Appendix B). This Court's jurisdiction is invoked, pursuant to Title 28 U.S.C. §1254(1). The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The "beyond a reasonable doubt" standard is a due process requirement. The Fifth Amendment to the United States Constitution provides, in pertinent part:

"No person shall...be deprived of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

A. CASE HISTORY

On April 17, 1991, Defendants, Quintero, Gomez-Morales, Patino-Monzalede, and Benitez, were indicted for conspiracy in Count One and Two, Attempt to Possess and Distribute Cocaine, that from on or about March 1991, to April 17, 1991 to possess with intent to distribute cocaine and possession with intent to distribute over 150 kilograms of cocaine in violation of Title 21 U.S.C. §846 and §841(a)(1) and (b)(1)(A)(ii)(II).

In May, 1991 a superseding Indictment was filed, which expanded the time frame of the conspiracy to October, 1988 through April 17, 1991, and added a count charging all defendants with attempted possession and possession with intent to distribute over 500 kilograms of cocaine hydrochloride.

Trial began November 21, 1992, in the United States District Court, District of Arizona, before the Honorable Earl E. Carroll. On February 12, 1992, the jury found Quintero guilty on all counts.

On June 15, 1992, Quintero was sentenced to life imprisonment on each count, to be followed by sixty (60) months supervised release, a $4,000,000 fine and an assessment of $100.

An Appeal to the Ninth Circuit was timely filed. Petitioner is serving a life term of imprisonment in the United States Penitentiary Lewisburg, Lewisburg, Pennsylvania.

B. FACTS

This case involves the Defendant's alleged use of a New York based trucking company to transport, and distribute in excess of 10,000

kilograms of cocaine. A summary of the trial evidence and facts are as follows:

The conspiracy alleged ten separate cocaine transactions in which a commercial truck, with a hidden compartment, would transport cocaine from one interstate location to another. The government's theory was that each of these transactions were orchestrated by Petitioner **Quintero**, the owner of the Suffolk Trucking Company. The government's primary witnesses were three former drivers for **Quintero's** company, Sergio Machuca, Harvey Snowden, and Steven Schwamy.

The case began in April, 1991, when United States Customs established a twenty-four hour surveillance of a Tucson, Arizona residence based upon a tip. Subsequently on the evening of April 5, 1991, agents observed an eighteen wheel tractor-trailer drive into that residential area.

Thereafter, a Chevrolet Blazer automobile drove from the suspected "stash house" and parked behind the commercial truck. Agents observed activity between the two vehicles leading them to believe contraband was being transferred.

The tractor trailer and Blazer thereafter left the residential area. The tractor trailer proceeded to Interstate Highway I-40 from Tucson, Arizona towards New Mexico and was followed by surveillance agents. The agents stopped the truck, which was occupied by Machuca, in Lordsburg, New Mexico. A search of the tractor trailer revealed 133 kilograms of cocaine hidden in a secret compartment of the trailer. Machuca was arrested and agreed to become a cooperating individual for a controlled delivery of the cocaine.

Machuca subsequently contacted **Quintero** and Co-defendant Grisales through a National Sky Page "beeper" system and was contacted by telephone and advised to travel to the Los Angeles area to receive an additional 309 kilograms of cocaine. Law enforcement agents maintained surveillance of Machuca and he was met in Los Angeles, California by Co-defendants Grisales and Benitez.

Subsequently, an additional 309 kilograms of cocaine hydrochloride were loaded into Machuca's tractor trailer and on September 13, 1991, he and Benitez left Los Angeles enroute to New York for delivery of the contraband. Grisales flew from Los Angeles to New York. Machuca and Benitez were advised to proceed to the Bronx Terminal Market in New York where they were met by **Quintero** and Patino Monzalde. Thereafter, Machuca proceeded to Queens, New York and **Quintero** proceeded to a residence where he was arrested.

It was established that in addition to the 442 kilograms of cocaine confiscated in New York on April 17, 1991, that Machuca drove additional deliveries between October, 1989 and October, 1991. The deliveries of cocaine to New York originated from Brownsville, Texas, Los Angeles, California and Miami, Florida.

The defense theory was that the drivers, who were government witnesses in the trial against **Quintero**, were tendering falsehoods in exchange for mitigation.

The drivers in some cases were the legal owner operators of the tractors that transported the contraband and were the actual traffickers, not **Quintero**. Contra trial testimony generally presented the government's theory of the case that the drivers were orchestrated at the direction of **Quintero** and Grisales.

On February 7, 1992, after a three month trial and four days prior to the final arguments, the Court read its instructions to the jury addressing the reasonable doubt standard. The reasonable doubt instruction articulated by the Trial Court departed from the approved Ninth Circuit Pattern Instruction, and in relevant part stated:

"I have told you that the government must prove the guilt of each defendant beyond a reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense. This means that you must return a not guilty verdict for a defendant if, after you have considered all the evidence in this case, you have a doubt based on reason and common sense that the defendant has proved that defendant's guilt. You may not convict on the basis of mere suspicion." (Emphasis added) The government properly brought to the Court's attention that there was an error in the Court's reading of Jury Instruction No. 16, the reasonable doubt instruction. The Court thereafter properly reread Jury Instruction No. 16. However, continued to employ the disfavored "willingness to act" reasonable doubt instruction:

"You should return a guilty verdict against a defendant, if but only if, you find the evidence so convincing that an ordinary person would be willing to make the most important decisions in his or her own life on the basis of such evidence." This instruction was superseded by Ninth Circuit Model Jury Instruction 3.03 in 1989, which excise the "willingness to act" notion and in its place inserted an expressed preference for the "hesitate to act" language as articulated in **Holland v. United States**, 348 U.S. 121 (1954).

The Trial Court instructed the jury four days prior to the close of evidence and final arguments. The "reasonable doubt" standard was

repeated to the jury no less than on fourteen separate occasions, leaving little doubt as to the significance of the notion.

Four days after the Court's reasonable doubt instruction to the jury, the jury on February 11, 1992 was left without any comprehensive discernment of the high degree of certainty required by the reasonable doubt standard.

The jury rather than being instructed by the Court before its deliberations as to the "reasonable doubt" standard, was left with the government's version during its rebuttal argument:

"Mr. Padilla told you about the standard of preponderance of the evidence. The preponderance of evidence is something that is anything greater than 50 percent. If it is more likely than not 51 percent or more, that something happened, that is a preponderance of the evidence. And I have just drawn a circle and am filling half of it in. What that means is that anything greater than half of that circle is going to be a preponderance of the evidence.

...

...

If you take a circle and fill it in all the way and look at that as proof beyond any doubt, consider that as a standard of proof beyond any doubt, 100 per cent.

...

...

Neither of these two things are the standards in this case. Preponderance of the evidence, anything greater than 50 percent. Proof beyond any doubt, 100 per cent.

...

...

Instead, the standard in this case is something in between and that is a very difficult thing to define and a difficult thing to understand.

...

...

Courts, lawyers, people have grappled with the concept for a long time. It is hard to define, but it is something in between these two things, 50 per cent and the 100 per cent."
(Emphasis added)

On Direct appeal, Petitioner, challenged the improper reasonable doubt instruction and the Trial Court's failure to re-instruct the jury as to the reasonable doubt standard upon the close of evidence, four days after the Court's earlier instruction.

The Ninth Circuit Court of Appeals thereafter affirmed its earlier holding by denying a petition for re-hearing en banc.

ARGUMENT

A. The United States Court of Appeals for the Ninth Circuit found no merit in the argument presented that the District Court gave an improper reasonable doubt instruction. The reasonable doubt instruction given in Quintero essentially was identical to the former Ninth Circuit Model Instruction No. 3.04 and commonly referred to as a "willingness to act" instruction. A superseding Ninth Circuit Model Instruction adopted a preference for the "hesitate to act" formulation. Compounding the instruction issue error was the fact that the Trial Court provided the jury their reasonable doubt instruction four days prior to the closing of all evidence. The jury was left to fend for themselves in the cognizable process to develop their own reasonable doubt standard when presented by the government's closing arguments and the last definition of reasonable doubt presented, that the standard is, "...hard to define but it is something in between these two things, 50 percent and the 100 percent."

The United States Court of Appeals for the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings in sanctioning the lower court's procedural defect, that the exercise of the Supreme Court's power of supervision is called for.

The United States Court of Appeals for the Ninth Circuit has rendered a decision that departs from the accepted proceedings of the cases below in dealing with a lower court's presentment to the jury the definition of reasonable doubt.

(1) United States Supreme Court (1990) Cage v. Louisiana, 498 U.S. 39.

(2) United States Supreme Court (1993) **Sullivan v. Louisiana**, 113 S.Ct. 2079.

(3) United States Supreme Court (1994) **Victor v. Nebraska**, 114 S.Ct. 1239.

In the case at bar, the Trial Court, over objection, gave an erroneous reasonable doubt instruction. In affirming the Trial Court's error, the Appellate decision asserts that the instruction was not necessarily reversible error because "taken with the other instructions [it] accurately conveyed the meaning of reasonable doubt", citing **United States v. Robinson**, 546 F.2d 309 (1976) **cert. denied** 430 U.S. 918 (1977). This assertion overlooks the United States Supreme Court's recent decision in **Sullivan v. Louisiana**, 508 U.S. ____113 S.Ct. 2078, 124 L.Ed. 2d 182 (1993). Specifically, the Supreme Court has indicated that a deficient reasonable doubt instruction, by itself, is a structural error such that it is always reversible error.

Since 1976, the Ninth Circuit has ignored certain districts courts' inclinations to give an erroneous "willingness to act" reasonable doubt instruction. **United States v. Robinson**, supra. Since 1976, in **Robinson**, **supra**, instead of reversing convictions, the Ninth Circuit has "exhorted" district judges to use the "hesitate to act" language settled in **Holland v. United States**, 348 U.S. 121 (1954), a case in which the "willingness to act" language was criticized. In **Holland**, supra at 140, the Supreme Court, in reviewing a "willingness to act" instruction substantially identical to that used in the present case, stated, in pertinent part: "This section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act,...rather than the kind on which he would be willing to act." This "willingness

to act" instruction was formerly the Ninth Circuit Model. **Manual of Model Criminal Jury Instructions for the Ninth Circuit**, No. 3.04 (1985). However, the Ninth Circuit acknowledged the insufficiency and inaccuracy of its former model instruction in commentary to the 1989 edition, **Manual of Model Criminal Jury Instructions for the Ninth Circuit**, where it states, in pertinent part:

"The committee has rejected this analogy because the most important decisions in life - choosing a spouse, buying a house, borrowing money, and the like - may involve a heavy element of uncertainty and risk taking and are wholly unlike the decisions jurors ought to make in criminal cases."

Commentary to Manual of Model Criminal Jury Instructions for the Ninth Circuit Model Jury Instructions No. 3.03; **United States v. Jaramillo-Suarez**, 950 F.2d 1378, 1386 (9th Cir. 1991).

The rationale used by the Ninth Circuit to justify its failure to reverse the repeated use of the "willingness to act" instruction is identical to that used by the Louisiana Supreme Court when it affirmed the first degree murder conviction of Tommy Cage in a case where the reasonable doubt instruction used phrases such as "grave uncertainty" and "moral certainty". The Louisiana supreme Court concluded that "taking the charge as a whole, reasonable persons of ordinary intelligence would understand the definition of 'reasonable doubt'". The United States Supreme Court, in **Cage v. Louisiana**, 498 U.S. 39, 41, 111 S.Ct. 328, 330, 112 L.Ed.2d 339, 342 (1990), rejected this justification, focusing on the individual reasonable doubt instruction, and concluded that the definition was contrary to the constitutional requirements. Since 1979, the judges of the Central District of California

have apparently abandoned the use of the disapproved "willingness to act" language. **United States v. Clabaugh**, 589 F.2d 1019, 1022, note 9 (9th Cir. 1979). It therefore appears that only select district judges have ignored the Ninth Circuit's exhortations and the commentary to the Ninth Circuit Model Instructions and continue to give the "willingness to act" instruction. The Supreme Court's decision in **Sullivan v. Louisiana**, supra, appears to now require reversal.

The use of this disapproved reasonable doubt definition was only part of the circumstances which undermined the jury's understanding of reasonable doubt, and which is ignored by the present appellate decision. Specifically, the Trial Court's decision, over defense objection, to give its closing instructions prior to closing argument consequently caused the jury to hear the government's improper rebuttal closing argument as its last reasonable doubt definition. This argument occurred four days after the trial court jury instructions. In between these events, the Trial Court also sustained objections to another defense attorney's attempt to define the varying degrees of proof in civil and criminal cases. The convicting jury **never** was substantially advised of the increasingly strict burdens of proof included in preponderance of the evidence, clear and convincing evidence, and reasonable doubt. The appellate decision ignored this argument notwithstanding the recognition of the differences and importance of those levels of proof stated in **United States v. Meza-Sorira**, 935 F.2d 166 (9th Cir. 1991). The **Cage v. Louisiana** and **Meza-Sorira** cases were cited in the Appellant's brief. **Sullivan v. Louisiana** was brought to the Court's attention after the filing of the briefs, but before oral argument by way of letter dated December 3, 1993. Similar to **Meza-Sorira**, **supra**, the defense was

entitled to "put the government to its proof" and require that a finding of guilt be beyond reasonable doubt, and not on the lesser standards of clear and convincing evidence and preponderance of the evidence. By precluding the jury's understanding of these levels of proof, and, consequently, allowing the government to argue that reasonable doubt was between fifty and one-hundred per cent, the due process and fair trial rights of the Appellant were violated. **Sullivan v. Louisiana**, **supra**.

The issue of correctly stating reasonable doubt is one of exceptional importance. Given the historic reticence of the Ninth Circuit to rebuke the continued usage of an erroneous reasonable doubt instruction by district courts, consideration by this Court is necessary to assure uniformity of reasonable doubt instructions.

It is presented that under the circumstances of the case at bar, that the District Court's deficient reasonable doubt instruction was reversible error and, the Appellate decision in this case overlooked recent United States Supreme Court Law addressing this issue, and ignores a seventeen year history of allowing an erroneous reasonable doubt instruction and impacts a part of all criminal trials which is exceptionally important and warrants American Jurisprudence uniformity. Additionally, it is submitted that when a Trial Court fails to instruct the triers of fact upon the conclusion of all evidence, there becomes a very real possibility of jurors' default in their understanding and concept of the high standard requirement of reasonable doubt juxtaposed to the other standards of legal decision-making, that of preponderance and clear and convincing.

The failure of a court to provide a complete and comprehensive definition of

reasonable doubt prejudices a defendant and denies him due process as guaranteed in the Fifth Amendment to the Constitution since it lessens the burden of the government's proof to obtain a conviction. A jury's understanding and concept of the reasonable doubt standard is confounded if they are left to fend for themselves and attempt to analyze that the "reasonable doubt" standard is somewhere between 51 to 100 percent assurance of guilt.

In **Cage v. Louisiana**, sss S.Ct. 328 (1990) the United States Supreme Court in reversing the conviction and sentence of **Cage** reiterated the importance under the Due Process Guarantee of the Fifth Amendment to the Constitution the necessity of adequately explaining and emphasizing the importance of a clear and unequivocal instruction portraying reasonable doubt. The Court's mandate in **Cage** affirms the importance of the Due Process Clause Guarantee of the Fifth Amendment to the United States Constitution that, in criminal cases, the interest of the Defendant are of such magnitude that historically and without any explicit Constitutional requirement they have been protected by Standards of Proof designed to exclude as nearly as possible the likelihood of erroneous judgment. See **Addinggton v. Texas**, 441 U.S. 418, 423 (1979); **Patterson v. New York**, 432 U.S. 197, 208 (1977) (The heavy standard [beyond a reasonable doubt] applied in criminal cases manifest concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free; In re **Winship**, 379 U.S. 358, 364 (1970) (the requirement that a criminal charge must be proven beyond a reasonable doubt is "indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of servitude of the facts in issue".)

The "reasonable doubt" standard is suppose to provide substance to the presumption of

innocence and instill confidence in the community that an innocent defendant will not be convicted. The importance of what words mean and define in the "reasonable doubt" legal standard, requires that the Trial Court prohibit mis-information or insufficient instruction to the jury, which could through their thought abstraction process, result in a misunderstanding of the high standard required, and a mis-apprehension of law. See in re **Winship**, "[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." In re **Winship**, 397 U.S. 358, 363-64, (1970). The reasonable doubt standard is therefore indispensable in American Jurisprudence Criminal Procedure. Id. at 364. Further, it reduces "the risk of convictions resting on factual error" and "provides concrete substance for the presumption of innocence" which "'lies at the foundation of the administration of our criminal law.'" Id. at 363 (quoting **Coffin v. United States**, 156 U.S. 432, 435 (1895) (The presumption of innocence is evidence created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created; a "reasonable doubt" is the condition of mind produced by the proof resulting from the evidence in the cause; Thus one is a cause, the other an effect; and the failure to instruct a jury in regard to the presumption of innocence excluded from their minds a portion of the proof created by law, and which they were bound to consider).

Standards of proof like other procedural due process requirements are shaped by the risk of error inherent in the truth seeking process as applied to the generality of cases, and the standard of proof necessarily must be calibrated in advance with the litigants and triers of fact requiring knowledge at the outset of a given

proceeding how the risk of error will be allocated. See **Stantosky v. Kramer**, 455 U.S. 745, 755 (1982)

Justice Ginsburg in **Victor v. Nebraska**, 114 S.Ct. 1239 (March,1994) observed that, "While judges and lawyers are familiar with the reasonable doubt standard, the words "beyond a reasonable doubt" are not self-defining to jurors. Several studies of jury behavior have concluded that "jurors are often confused about the meaning of reasonable doubt", when the term is left undefined...thus even if definitions of reasonable doubt are necessarily imperfect, the alternative - refusing to define the concept at all - is not obviously preferable."

Petitioner respectfully urges acceptance of review by this Honorable Court, on certiorari, to consider and determine whether the Sentencing Court erred when it did not provide the approved Ninth Circuit Jury Pattern Instruction which included the "hesitate to act" notion in substitution of the "willingness to act" reasonable doubt standard. Further, the Sentencing Court should have sua sponte reinstructed the government's definition of "beyond a reasonable doubt" articulation to the jury upon the close of evidence during its rebuttal argument where presented to the jury that the "reasonable doubt" standard was:

> "Courts, lawyers, people have grappled with the concept for a long time. **It is hard to define, but it is somewhere in between these two things, 50 percent and the 100 percent**"(Emphasis added)

See **United States v. Moreno-Pulido**, 695 F.2d 1141 (9th Cir. 1983); **Taylor v. Kentucky**, 436 U.S. 478 (1978).

CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari for the following reasons:

Petitioner should have been afforded a "reasonable doubt" instruction which included the approved Ninth Circuit Jury Pattern Notion of "hesitate to act" rather than the "willingness to act" instruction provided by the Trial Court. Additionally, the Trial Court should have sua sponte corrected the government's rebuttal closing argument which provided the jury with the notion that "beyond a reasonable doubt" was a concept in pertinent part that, "Courts, lawyers, people have grappled with the concept for a long time. **It is hard to define, but it is something in between these two things, 50 per cent and the 100 percent**," four days after the Trial Court's instruction and prior to jury deliberations. (Emphasis added)

Respectfully submitted,

Cloud H. Miller, III
710 Lake View Ave. N.E.
Atlanta, Georgia 30308
404-874-9553
1-800-992-0832

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(Filed January 25, 1994)

Case Number: 92-10402

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIMMY GRISALES, ET. AL.

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA D.C.NO. CR-91-00139-4-EHC

MEMORANDUM

BEFORE: WALLACE, Chief Judge, GARTH (sitting by designation, United States Circuit Judge Third Circuit Court of Appeals) and WIGGINS, Circuit Judges.

Gomez-Morales (Gomez), Patino Monzalde (Patino), Benitez, Grisales, and Quintero appeal from their judgments of conviction for conspiracy to distribute cocaine and attempting to possess cocaine with intent to distribute, each a violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)(ii)II). The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

Each appellant argues that the district court erred in refusing to instruct the jury on multiple conspiracies. They contend that the trial evidence demonstrated that more than one conspiracy existed. A multiple conspiracies instruction should be given when the indictment alleges a single conspiracy, but the trial evidence would allow a reasonable jury to conclude that a defendant was involved only in a separate, unrelated conspiracy. **United States v. Anguiano**, 873 F.2d 1314, 1317 (9th Cir.), **cert. denied**, 493 U.S. 969 (1989). We review de novo whether the proof at trial supports a multiple conspiracies instruction. **Id.**

The indictment alleged that each was a member of a single conspiracy to transport cocaine from various entry points to New York City for distribution. The evidence substantiated that each was a member of the conspiracy for at least part of its existence. The evidence was not sufficient to allow a reasonable jury to conclude that one or some of

the appellants were involved only in a separate, unrelated conspiracy. The district court did not err in rejecting the proposed multiple conspiracies instructions.

II

Each appellant argues that the district court erred in refusing to give the jury a specific unanimity instruction. In a conspiracy case, a specific unanimity instruction is required when a genuine possibility exists that the jury might convict a defendant without agreeing upon which act was committed in furtherance of the conspiracy. **Id.** at 1319. Because we have concluded that the evidence did not support a finding of multiple conspiracies, any argument that the jury was not instructed that they must all agree upon which conspiracy each defendant joined is without merit.

III

Each appellant argues that the district court gave an improper reasonable doubt instruction. A reasonable doubt instruction is reviewed de novo to determine whether it is an accurate statement of the law. **United States v. Velasqquez**, 980 F.2d 1275, 1278 (9th Cir. 1992), **cert. denied**, 113 S.Ct. 2979 (1993)

The reasonable doubt instruction given in this case was essentially identical to former Ninth Circuit Model Instruction No. 3.04, and is commonly referred to as a "willingness to act" instruction. Some of our opinions have stated a preference for the "hesitate to act" formulation. Obviously, stating a preference is not a holding;it is mere dicta. Thus, use of a "willingness to act" formulation is not necessarily reversible. **Id.** at 1277.

In **United States v. Robinson**, 546 F.2d 309 (1976), **cert. denied**, 430 U.S. 918 (1977), we

held that this instruction, taken with the other instructions, accurately conveyed the meaning of reasonable doubt. Id. at 314. In **United States v. Jaramillo-Suarez**, 950 F.2d 1378 (9th Cir. 1991), we reaffirmed this holding, stating that taken in context of the instruction as a whole, the willingness to act language "did no detract from the heavy burden suggested by the use of the term reasonable doubt standing alone." Id. at 1386. Given this precedent, we conclude that the reasonable doubt instruction given by the district court in this case was not an erroneous statement of the law.

Each appellant argues that the trial court should not have instructed the jury on the meaning of reasonable doubt prior to closing arguments. They suggest that the court should have instructed the jury after closing arguments so as to correct misunderstandings about the meaning of reasonable doubt created during the closing arguments. Federal Rule of Criminal Procedure 30 gives the district court discretion to instruct the jury prior to closing arguments. In this case, the court orally instructed the jury prior to closing arguments and then provided a written copy of the instructions for the jury to use during their deliberations. We conclude that this was not an abuse of discretion.

Each appellant argues that commentary on the meaning of reasonable doubt during closing arguments may have confused the jury. We review for abuse of discretion the district court's decision to allow the jury to consider comments made in closing argument after an objection is made. **United States v. Diaz**, 961 F.2d 1417, 1418 (9th Cir. 1992). If no objection to the comments is made at trial, then review is for plain error. See **United States v. Feldman**, 853 F.2d 648, 652 (9th Cir. 1988), cert. denied, 489 U.S. 1030 (1989).

Appellants argue that counsel for Quintero and Gomez gave erroneous explanations of reasonable doubt. No defendant raised these objections at trial.

Quintero's counsel based his comments on the district court's instructions. We conclude that these statements by counsel were not plain error.

Gomez's counsel suggested that the reasonable doubt standard was analogous to a painter's canvas, and unless the canvas was completely covered with paint the standard was not satisfied. If anything, this overstates the standard. When the government objected, the district court properly admonished the jury to follow the instructions of the court. This was not an abuse of discretion.

Appellants argue that the district court improperly interfered with Gomez's counsel's attempt to compare the reasonable doubt standard with other legal standards. However, standards such as probable cause and preponderance of the evidence are irrelevant. The district court did not abuse its discretion by disallowing the comparison.

Appellants argue that the government misstated the standard by suggesting that beyond a reasonable doubt means anything between 50 and 100% certainty. No objection was made at trial, therefore we review for plain error. After reviewing the record we conclude that the appellants have misconstrued the government's commentary. Considered as a whole the government's comments concerning reasonable doubt did not constitute plain error.

All other arguments relating to reasonable doubt have been carefully considered and rejected as being without merit.

IV

Gomez argues that the district court abused its discretion in denying his motion to depose five people in Colombia. We review this claim for abuse of discretion. **Guam v. Ngirangas**, 806 F.2d 895, 896 (9th Cir. 1986).

The district court cited the following reasons for denying Gomez's motion: (1) the motion for depositions was untimely -- it was filed five to six weeks after the start of the tria; (2) security concerns prevented the prosecution from traveling to Colombia; and (3) the affidavits in support of the motion were not sufficiently specific. A request for depositions may be denied because it is untimely. **United States v. Nichols**, 534 F.2d 202, 204 (9th Cir. 1976). Under the circumstances the district court did not abuse its discretion in denying Gomez's motion.

V

Each appellant argues that the government improperly vouched for the truthfulness of its witnesses. Vouching is prosecutorial misconduct, which we review to determine if it is more likely than not that the alleged misconduct affected the jury's verdict. **United States v. Simtob**, 901 F.2d 799, 806 (9th Cir. 1990) (**Simtob**).

Gomez, Patino, Grisales, and Benitez complain that the government improperly elicited testimony from two witnesses that their plea agreements required truthful testimony. In opening arguments, counsel attacked the credibility of these two witnesses. When a witness's credibility has been thus attacked, the government may elicit testimony about the truthfulness provisions of the witness's plea bargain. **United States v. Necoechea**, 986 F.2d 1273, 1278-79 (9th Cir. 1993) (**Necoechea**).

Grisales and Benitez argue that the prosecution improperly elicited testimony about the truthfulness provisions of a witness's immunity agreement. The district court gave a prompt curative instruction after the witness first referred to the truthfulness requirement. This was sufficient to neutralize the effect of the statement. **Simtob**, 901 F.2d at 806. Indeed, defense counsel subsequently opened the door for further exploration of the truthfulness requirement by cross-examining the witness about his immunity agreement.

Quintero argues that the government improperly vouched for a witness during closing arguments by asserting the superior quality of his testimony. The government outlined the quality of his testimony. The government outlined the quality of proof offered by a defense expert and that of its own expert and invited the jury to compare the two, suggesting that the government's proof was superior to that of the defense. This is a new argument on appeal and therefore is reviewed only for plain error. **Necoechea**, 986 F.2d at 1276. The government's comments during closing arguments were not vouching, they were good advocacy. Certainly there was no plain error.

VI

Grisales and Benitez argue that the cumulative effect of improper vouching and the admission of improper "bad act" evidence denied them a fair rial. Actions that were not misconduct or that did not constitute error are not considered in reviewing a cumulative effect argument. **United States v. Berry**, 627 F.2d 193, 201 (9th Cir. 1980), **cert. denied**, 449 U.S. 1113 (1981). Evidentiary rulings re reviewed for abuse of discretion. **United States v. Brown**, 880 F.2d 1012, 1014 (9th Cir. 1989)

The alleged "bad act" evidence included: (1) evidence that Quintero distributed a shipment of cocaine; (2) evidence that Quintero's trucking company had a large amount of unexplained wealth; (3) evidence that Grisales tried to evade police prior to his arrest; (4) evidence that Quintero purchased agricultural equipment; and (5) identification documents seized from Grisales's car belonging to a coconspirator. None of this evidence constitutes prior "bad act" evidence under Federal Rule of Evidence 404(b). It is direct or circumstantial evidence of the existence of the conspiracy. The district court did not abuse its discretion by admitting this evidence.

Grisales and Benitez were not denied a fair trial because of the cumulative effect of vouching and improper evidentiary rulings. Each allegation of misconduct or error is individually without merit. Together they fare no better. **United States v. Payne**, 944 F.2d 1458, 1477 (9th Cir. 1991), **cert. denied**, 112 S.Ct. 1598 (1992).

VII

Patino and Benitez argue that their convictions were not supported by sufficient evidence. The standard of review for this claim is extremely deferential. **United States v. Rubio-Villareal**, 967 F.2d 294, 296 (9th Cir. 1992) (en banc). Sufficient evidence exists to support a conviction if, when reviewing the evidence and all reasonable inferences in the light most favorable to the government, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319 (1979).

Patino argues that the government witnesses that testified against him lacked credibility. But the standard of review for this issue

assumes the credibility of witnesses. Benitez contends that the government failed to prove either the existence of the conspiracy or his connection to it beyond a reasonable doubt. However, his own admission that he flew to Los Angeles to help a coconspirator transport cocaine to New York and that he expected to be paid for his efforts defeats this contention. Viewing the evidence and the reasonable inferences in the light most favorable to the government, we conclude that a rational jury could have convicted Patino and Benitez.

VIII

Grisales argues that the district court erred in refusing to give his proposed instruction on good character. A defendant is entitled to an instruction on any defense theory supported by sufficient evidence. **United States v. Faust**, 850 F.2d 575, 583 (9th Cir. 1988). We recognize the conflict concerning the standard of review for the denial of a proposed jury instruction. **United States v. LaFleur**, 971 F.2d 200, 204 (9th Cir. 1991), **cert. denied**, 113 S.Ct. 1292 (1993). But whether we review de novo or for abuse of discretion, this argument is without merit. The evidence is insufficient to warrant an instruction on good character.

IX

Grisales and Patino argue that testimony about two incriminating statements and admissions made by Benitez violated their confrontation clause. **United States v. George**, 960 F.2d 97, 99 (9th Cir. 1992).

Benitez's statement to Machuca that he intended to cooperate did not implicate any codefendant, and his statements to agent Kelly confessing involvement in the conspiracy were redacted to omit any reference to the existence of the coconspirators. The district court

carefully instructed the jury that these statements were only admissible against Benitez. The confrontation clause rights of Grisales and Patino were not violated. **United States v. Marsh**, 481 U.S. 200, 211 (1987).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Filed April 4, 1994)

No. 92-10410

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMY GRISALES, ET. AL,

Defendant-Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ON PETITION FOR REHEARING

(April 4, 1994)

Before WALLACE, CHIEF JUDGE, GARTH AND WIGGINS, CIRCUIT JUDGES.

PER CURIAM

The petition for rehearing of Monzalde is denied.

The petition for rehearing of Gomez-Morales is denied.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc filed by Grisales.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed June 19, 1992)

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA

v.

JAMIE QUINTERO

JUDGMENT IN A CRIMINAL CASE
Case Number: CR-91-139-07-PHX-EHC

Michael B. Bernaya
Attorney for Defendant

THERE WAS A:

[( ) finding (X) verdict] of guilty as to count(s) I and II

[( ) finding ( )] of not guilty as to count(s) _____

( ) judgment of acquittal as to count(s)_____

The defendant is acquitted and discharged as the this/these count(s) 0

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Title 21, United States Code, Section 846 and 841(a)(1) and (b)(1)(A)(ii)(II), conspiracy to Distribute Cocaine, Count I

Title 21, United States Code, Section 846 and 841(a)(1) and (b)(1)(A)(ii)(II), Attempt to Possess and Distribute Cocaine, Count II - both Class A felonies.

IT IS THE JUDGMENT OF THIS COURT THAT:

Defendant is committed to the custody of the Bureau of Prisons for a term of life imprisonment as to each count. Sentence to be served concurrently. Upon release from custody, defendant is sentenced to a term of **SIXTY (60) MONTHS supervised release.** In addition to the standard conditions of supervised release, the following special conditions are imposed:

1. Defendant shall report to the U.S. Probation Office nearest his residence within 72 hours of his release from custody.
2. Defendant shall submit to search and seizure of person or property as directed by his supervising probation officer.
3. Defendant shall pay a fine in the amount of **FOUR MILLION ($4,000,000.) DOLLARS,** due and payable immediately. Payment may be collected through the Inmate Financial Responsibility Program during the period of defendant's incarceration.

Defendant is advised of his right to appeal the imposed sentence within 10 days from this date.

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if

arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work, notify your probation officer at once and consult him prior to job changes);
(4) not leave the judicial district without the permission of your probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow your probation officer's instructions, report as directed, and comply with any general or special conditions pursuant to District of Arizona General Order 201.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

IT IS FURTHER ORDERED that the defendant shall immediately pay to the Clerk of the Court a total special assessment of **$100** pursuant to Title 18, U.S.C. Section 3013 for count(s) **I and II** as follows: **immediately. May be collected through the Inmate Financial Responsibility Program during the defendant's term of incarceration.**

IT IS FURTHER ORDERED that counts **none** are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States Attorney for this district any amount imposed as restitution. The

defendant shall pay to the Clerk of the Court any amount imposed as a fine and as a cost of prosecution. Payment of such amount is due immediately but, if so ordered shall be payable in equal monthly installments with payment in full by a date certain. In all cases restitution, fines, and costs shall e payable during the period of incarceration with the payment of any remaining balance to be a condition of probation or supervised release. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the United States Attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the Clerk of the Court deliver a certified copy of this judgment to the United States Marshal of this district.

( ) The Court orders commitment to the custody of the Bureau of Prisons and recommends:

JUNE 15, 1992
Date of Imposition of Sentence

Signature of Judicial Officer

Earl H. Carroll,
U.S. District Court Judge

Name and Title of Judicial Officer

Date

RETURN

I have executed this Judgment as follows:_____
_____
_____
_____
_____

Defendant delivered on _____to_____
at_____, the institution designated by the Bureau of Prisons, with a certified copy of this Judgment in a Criminal case.

_____
United States Marshal

By _____
Deputy Marshal

Date of Sentence June 15, 1992

Case No. Cr-91-139-07-PHX-EHC

UNITED STATES OF AMERICA vs. Jamie Quintero

STATEMENT OF REASONS FOR IMPOSING SENTENCE

1. The Court adopts the facts as set forth in the presentence report attached hereto and marked as Exhibit A.

2. Finding of controverted guideline-relevant facts:

_____NONE

_____AS FOLLOWS:

Defendant's Offense Level 42 - subject to 1500 or more kilograms of cocaine.

Defendant an organizer and leader of the conspiracy - and offense level of re - per guideline 5A.

3. Guideline applications:

The Court finds that the applicable offense level is 43, the applicable criminal history category is _____, and the applicable ranges as follows:

_____ to Life months incarceration

_____ to 60 months supervised release

$25,000 to $4,000,000 fine

$ N/A Restitution

$100.00 Special Assessment

_____ The reasons for these guideline determinations are set forth in paragraph(s) 17-32 of the presentence report, which the Court finds reasonably address, in totality, the criminal conduct in question OR

_____ Plea Bargain - The Court has accepted a plea agreement because it is satisfied that the agreement adequately reflects the seriousness of the actual offense behavior and that accepting the plea agreement will not undermine the statutory purpose of sentencing.

4. DEPARTURES:

_____ none/as follows:

5. SENTENCE IMPOSED:

_____ Months Probation Life Months Imprisonment.

_____ Months Supervised Release with Standard Conditions

60 Months Supervised Release with Special Conditions as follows:

_____

_____ Restitution is in the amount of $_____ to be made to _____

_____ Restitution **NOT APPLICABLE**

_____ Partial Restitution in the amount of $_____ is imposed in this case because information about the defendants financial resources and family resources contained in the presentence report indicate that imposed restitution in the full amount would place an unwarranted burden on the defendants family.

_____ **FINE** in the amount of $4,000,000 is imposed on the defendant.

_____ The Court is imposing **NO FINE** in this case because the defendants lack of assets make it unlikely that he will be able to pay a fine.

_____ **SPECIAL ASSESSMENT** of $100.00 is imposed on the defendant pursuant to 18 USC 3013, payable immediately.

_____ /s/Earl H. Carroll

DATE UNITED STATES DISTRICT JUDGE